

B/S

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FILED
U.S. DISTRICT COURT
INDIANAPOLIS DIVISION

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SAVE THE VALLEY, INC.,
THOMAS BREITWEISER AND
L. JAE BREITWEISER,

Plaintiffs,

vs.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, CAROL BROWNER,
Individually and as ADMINISTRATOR OF
THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY And DAVID ULLRICH,
Individually and as ACTING REGIONAL
ADMINISTRATOR OF THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
REGION 5,

Defendants.

U.S. DISTRICT COURT
OF INDIANA
LAURA A. BRIGGS
CLERK

CAUSE NO.:

1) P99-0058 C . B/S

**COMPLAINT FOR INJUNCTIVE
RELIEF AND FOR WRIT OF MANDAMUS**

COME NOW the Plaintiffs, Save The Valley, Inc. ("STV"), Thomas Breitweiser and L. Jae Breitweiser (the "Breitweisers"), by counsel, and for their Complaint for Injunctive Relief against the Defendants, United States Environmental Protection Agency, Carol Browner, Individually and as Administrator of the United States Environmental Protection Agency, and David Ullrich, Individually and as Acting Regional Administrator of the United States Environmental Protection Agency, Region 5 (collectively "EPA"), and state as follows:

I. JURISDICTION

1. The Plaintiffs' Complaint involves a question of federal law and jurisdiction is therefore proper with this Court pursuant to 28 U.S.C. §1331.
2. The Plaintiffs' Complaint arises under the citizen suit provision of the Clean Water Act, 33 U.S.C. §1365(a).

3. The Plaintiffs' Complaint also arises under the Federal Mandamus Statute, 28 U.S.C. §1361.

4. 33 U.S.C. §1365(a) grants this Court jurisdiction to order the Administrator of EPA to perform any act or duty under the Clean Water Act which is a non-discretionary duty to be performed by the Administrator.

5. 33 U.S.C. §1319 requires the Administrator of EPA to perform specific non-discretionary duties regarding state environmental programs.

6. 33 U.S.C. §1342 also requires the Administrator of EPA to perform specific non-discretionary duties regarding state environmental programs.

7. As a jurisdictional prerequisite to filing this lawsuit, and in compliance with 33 U.S.C. §1365(b), the plaintiffs have given notice to EPA and the Administrator of the failure of EPA and the Administrator to perform non-discretionary duties (attached hereto and marked as Exhibit "A" is a copy of the notice letter sent by the Plaintiffs to the EPA and the Administrator).

8. The failure of EPA and the Administrator to require the State of Indiana and the Indiana Department of Environmental Management to adopt and enforce adequate and proper laws and regulations for effluent limitations and for the discharge of pollutants from confined animal feedings operations (hereinafter "CAFOs") into navigable waterways of the United States has caused the Plaintiffs injury in the form of a diminution of the Plaintiffs' aesthetic, recreational, and environmental use and enjoyment of the effected waterways which are currently under the authority of the State of Indiana and the Indiana Department of Environmental Management.

9. A favorable decision by this Court would redress the Plaintiffs' injuries cause by the failure of EPA and the Administrator to perform the non-discretionary duties of requiring that the State of Indiana be in compliance with 33 U.S.C. §1319 and 33 U.S.C. §1342.

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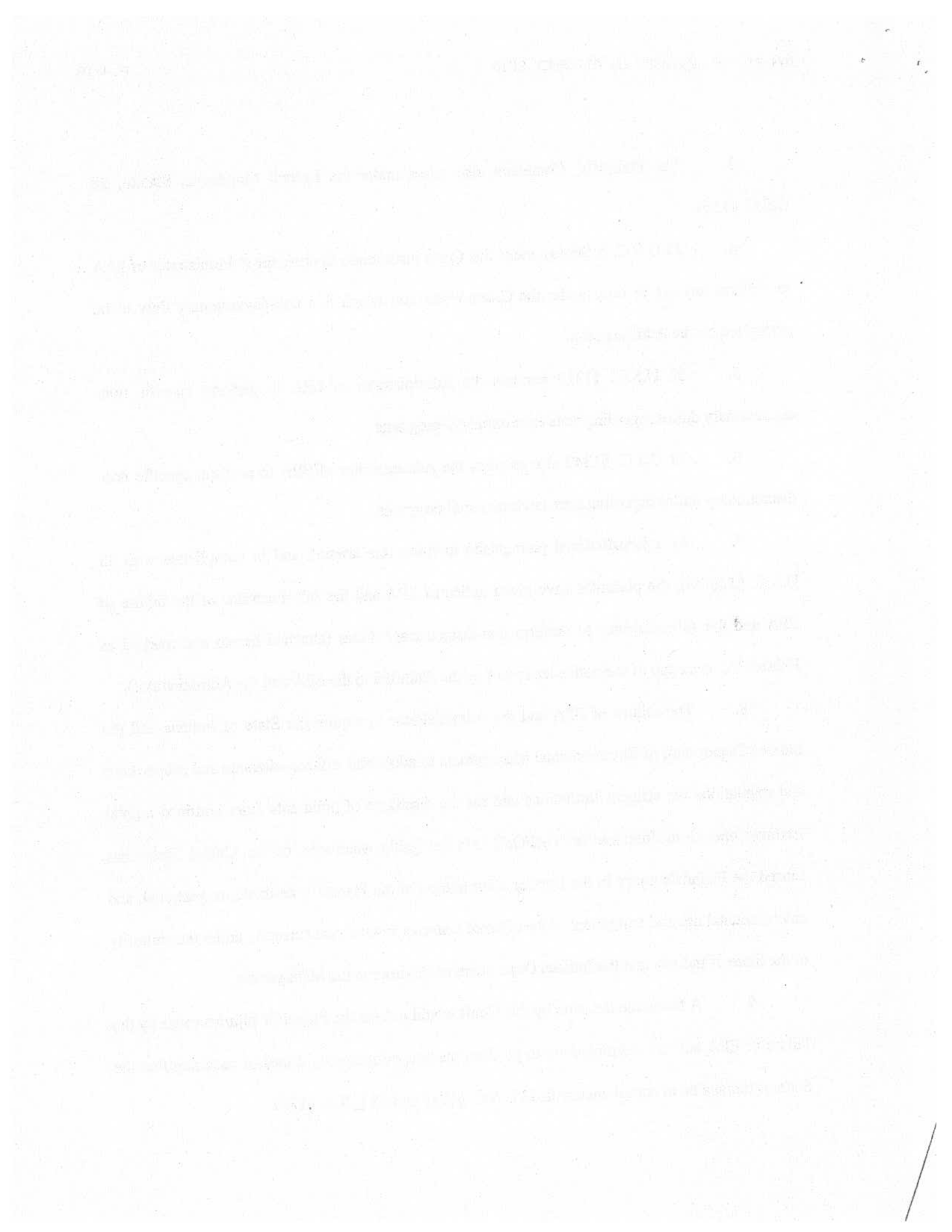
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II. FACTUAL ALLEGATIONS

10. STV is a Kentucky not for profit corporation dedicated to protecting the environment.
11. STV is comprised of members from various states including Indiana and Kentucky.
12. Members of STV live in areas in Indiana near or adjacent to existing and proposed CAFOs.
13. The Breitweisers are citizens of the State of Indiana.
14. The Breitweisers own property in Jefferson County, Indiana, which consists of approximately 300 acres. The Breitweisers maintain a residence and operate farms in Jefferson County, Indiana.
15. The Breitweisers own and live on property in Indiana adjacent to a proposed CAFO which has gained preliminary approval from the State of Indiana.
16. The Indiana Department of Environmental Management ("IDEM") is an agency of the State of Indiana. John Hamilton is the Commissioner of IDEM. The Commissioner is charged with protecting the environment and protecting the citizens of the State of Indiana from injury and illness caused by hazardous substances.
17. Indiana is currently targeted by the hog farming industry as a state in which the industry believes it can construct large industrialized hog farming operations known as CAFOs with few regulations and with little opposition by state regulators.
18. The construction and operation of CAFOs is a growing trend in the United States and in the State of Indiana.
19. The construction and operation of CAFOs has generated substantial national media attention because of the substantial threat to public health.

20. CAFOs can and have caused substantial environmental damage and pose a serious threat of harm to human health.

21. In a typical swine CAFO:

- A. Swine are continuously confined in small pens within large buildings, where the animals are fed, bred, medicated, and monitored. The animals are fed, watered, heated, and cooled through automated systems. Other than for transporting the livestock from one building to another, or moving the animals from the CAFO to the slaughterhouse, the animals spend the vast majority of their lives in these small pens.
- B. The floors of the pens are slatted, so the waste excreted by the confined animals falls through the floor and onto a second, lower floor. Several times a day the waste is flushed into open pits, or "lagoons" located outside the buildings.
- C. An operation of 600 sows (by definition, the smallest possible swine "confined feeding operation") produces about 8,400 gallons of water and waste every day. CAFOs can exceed 20,000 sows in size. 750
- D. The swine waste is stored for up to one year in what the hog farming industry refers to as lagoons.
 - 1. The lagoons, which are actually nothing more than unlined, open cesspools, are huge pits dug into the earth, sometimes encompassing several acres and millions of cubic feet.
 - 2. Most lagoons are not lined to prevent leakage of the animal waste into the ground water. Rather, the solids from the animal waste are expected to sink to the bottom of the lagoons to form a natural liner.
 - 3. CAFO lagoons have a history of failures, both through leakage and breakage.
 - 4. When a lagoon wall breaks, potentially millions of gallons of animal waste spill from the lagoons into the surrounding environment. For example, in North Carolina in 1995, the wall of a lagoon broke, spilling Twenty Five Million (25,000,000) gallons of animal waste onto nearby highways, farms, and into nearby rivers causing significant environmental damage.
- E. Tanker trucks transport the waste to croplands or pastures where the waste water is sprayed or spread as a means of disposal. Some of the waste water is recycled into the flushing system.

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F. CAFO waste contains many of the components of, and is, in many instances, more toxic than other forms of industrial waste.

22. Multiple states have issued moratoriums on the construction of CAFOs because of the severe threat to humans and the environment.

23. The Kentucky Attorney General has issued an opinion which states that CAFOs are not farms but rather industrial operations which generate industrial type waste.

24. Large numbers of microorganisms, including viruses, bacteria, protozoans, and parasites are excreted in swine waste or are present in lagoons and can be transmitted to humans.

25. Pfiesteria, a micro-organism that feeds on the blood of fish and, possibly humans, thrives in bodies of water containing high levels of nitrogen and phosphorous. Pfiesteria secrete a toxin that eats holes in fish, slowly paralyzing and suffocating the fish. The proliferation of pfiesteria in North Carolina has been blamed on that state's large CAFOs, which have inundated the waters of North Carolina with nitrogen and phosphorous.

26. Swine waste is rich in several metals, nitrogen compounds (nitrates), phosphorus, and potassium.

A. Swine waste contains copper, nickel, manganese and zinc. At the concentrations found in swine waste, these metals can lead to permanent soil damage.

B. While copper and zinc can be beneficial to crops in the short run, excessive amounts of copper and zinc can sterilize cropland, making it unproductive.

C. Liquid waste from swine CAFOs is known to be high in nitrates, principally in the form of ammonia. At high concentrations, ammonia is toxic to animal, aquatic, plant, and human life.

27. The presence of high levels of ammonia in swine waste which is sprayed or spread on land or which is leaked or spilled out of lagoons adversely affects the ground water quality with

high concentrations of ammonia.

28. Increased concentrations of ammonia in surface water from runoff can hinder or prohibit the reproduction of fish and other aquatic life.

29. Swine waste contains nitrate-nitrogen, which causes methemoglobinemia, a disease that interferes with the blood's ability to absorb oxygen and which can be fatal to infants.

30. Swine CAFOs pollute the environment in a number of ways.

- A. Pipes carrying swine waste from the confinement buildings to the lagoons leak, break, or otherwise fail, releasing swine waste into the environment.
- B. Swine waste leaks from the lagoons into the ground water.
- C. Lagoon walls break, spilling millions of gallons of swine waste into the surrounding environment.
- D. Lagoons become too full, spilling swine waste into the environment.
- E. Trucks transporting swine waste from lagoons to croplands or pastures for disposal have accidents resulting in discharges of swine waste into the environment.
- F. CAFO operators have reportedly intentionally and improperly discharged swine waste into nearby waters as a means of disposal.
- G. Croplands or pastures upon which the swine waste is sprayed or spread become concentrated with metals, nitrogen compounds (nitrates), phosphorus, and potassium. This is especially true when CAFO operators fail to properly monitor the level of these pollutants in the disposal area.
- H. Swine waste "runs off" the disposal areas into nearby bodies of water and neighboring properties. This is especially true when swine waste is applied to lands with unsuitable soils or topography, when land application of swine waste is followed by rains, or when swine waste is applied to frozen land.
- I. Clouds of manure mist associated with the spraying application of swine waste carry pollutants in gaseous state and as particulate matter attached to water vapor.
- J. Manure lagoons emit large amounts of ammonia gas, which returns to the earth in rain. Ammonia can cause rapid growth of certain types of algae. Large concentrations of these types of algae kill fish and otherwise result in

high concentrations of ammonia.

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degradation of the aquatic habitat.

- K. The nitrogen, phosphorus, and other substances found in swine waste can cause rapid growth of certain types of algae. Large concentrations of these types of algae kill fish and otherwise result in degradation of the aquatic habitat.

31. Leakages, spillages, and intentional discharges of swine waste were blamed for a number of fish kills in Indiana in 1994 and 1995. For example:

- A. In Vigo County, 1,500 fish were killed and 2 miles of Prairie Creek was polluted by animal waste;
- B. In Boone County, 200 fish were killed and 1 mile of Rogers Ditch was polluted by animal waste;
- C. In Boone County, 146 fish were killed and an unknown area of Sims/Rogers Ditch was polluted by animal waste;
- D. In Hancock County, 108 fish were killed and 60,000 square feet of Six Mile Creek was polluted by animal waste;
- E. In Tippecanoe County, 25 fish were killed and 1/4 mile of Laramie Creek was polluted by animal waste; and
- F. In Warrick County, 100 fish were killed and 1 mile of Cypress Creek was polluted by animal waste.

32. Indiana enacted statutes relating specifically to the construction and/or operation of CAFOs. The statutes were first enacted in 1971.

33. As of this date, IDEM has not developed any requirements for CAFOs regarding the approval of manure handling.

34. IDEM has admitted it currently lacks regulations and rules to properly regulate CAFOs.

35. IDEM has not adopted any rules or regulations relating to Ind. Code §13-18-10 et seq. as amended in 1997.

36. A federal Court has previously determined that the pre-July 1997 Indiana CAFO statutes were not comparable to the provisions of 33 U.S.C. §1319(g). Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc., 735 F.Supp 1404 (N.D.Ind. 1990).

37. The Indiana CAFO statutes as amended in July of 1997 are also not comparable to the provisions of 33 U.S.C. §1319(g).

III. ADMINISTRATOR'S NON-DISCRETIONARY DUTIES

38. 33 U.S.C. §1319(a)(2) reads:

Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereinafter referred to in this section as the period of "Federally Assumed Enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person...

- (A) by issuing an order to comply with such condition or limitation, or
- (B) by bringing a civil action under subsection (b) of this section. (emphasis added).

39. 33 U.S.C. §1342(c)(3) reads that:

Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall have notified the State, and made public, in writing, the reasons for such withdrawal

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(emphasis added).

40. The Administrator has failed to notify the State of Indiana, Indiana Department of Environmental Management, pursuant to 33 U.S.C. §1319(a)(2) that violation of permit conditions or limitations are so widespread that such violations indicate a failure on the part of the State of Indiana to effectively enforce permit conditions or limitations.
41. The Administrator has failed to give public notice to the citizens of the State of Indiana, Indiana Department of Environmental Management, pursuant to 33 U.S.C. §1319(a)(2) that the State of Indiana, Indiana Department of Environmental Management, has failed to effectively enforce permit conditions or limitations.
42. The Administrator has failed to institute a period of federally assumed enforcement of permit conditions or limitations pursuant to 33 U.S.C. §1319(a)(2).
43. The Administrator has failed to notify the State of Indiana, Indiana Department of Environmental Management, that the State of Indiana pollution discharge elimination system permit program is not being administered in accordance with the requirements of 33 U.S.C. §1342.
44. The Administrator has failed to withdraw approval of the State of Indiana, Indiana Department of Environmental Management, Pollution Discharge Elimination System Permit Program even though there is substantial evidence that the State of Indiana permit program does not comply with the provisions of 33 U.S.C. §1342.

V. REQUEST FOR RELIEF

WHEREFORE, the Plaintiffs respectfully request from this Court the following relief:

1. An Injunctive Order issued pursuant to 33 U.S.C. §1365(a) requiring the Administrator to perform all non-discretionary enforcement duties pursuant to 33 U.S.C.

§1319(a)(2) in the State of Indiana within thirty (30) days;

2. An Injunctive Order issued pursuant to 33 U.S.C. §1365(a) ordering the Administrator to perform all non-discretionary duties required in 33 U.S.C. §1342(c)(3) with respect to the State of Indiana and the Indiana Department of Environmental Management permit process for CAFOs;

3. An Injunctive Order issued pursuant to 33 U.S.C. §1365(a) ordering the Administrator to perform all non-discretionary duties required in 33 U.S.C. §1342(b) with respect to the State of Indiana and the Indiana Department of Environmental Management permit process for CAFOs;

4. A Writ of Mandamus issued pursuant to 28 U.S.C. §1361 compelling the Administrator to perform all non-discretionary duties required in 33 U.S.C. §1319 and 33 U.S.C. §1342 with respect to the State of Indiana and the Indiana Department of Environmental Management permit process for CAFOs.

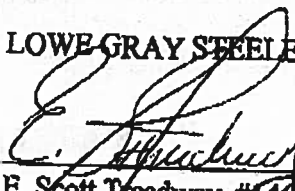
5. Plaintiffs' attorney fees;

6. Costs of this action; and

7. All other proper relief just and proper in the premises.

Respectfully submitted,

LOWE GRAY STEELE & DARKO, LLP


E. Scott Treadway, #14075-49


Jon K. Stowell, #18183-03

Attorneys for Plaintiffs,

Thomas Breitweiser,

L. Jae Breitweiser and Save The Valley, Inc.

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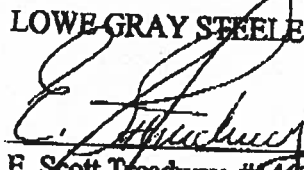
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LOWE GRAY STEELE & DARKO, LLP


E. Scott Dreadway, #14675-49


Jon K. Stowell, #18183-03

Attorneys for Plaintiffs,

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L. Jae Breitweiser and Save The Valley, Inc.

LOWE GRAY STEELE & DARKO, LLP

Bank One Tower

111 Monument Circle, Suite 4600

Indianapolis, IN 46204-5146

(317) 236-8020

FAWP/KS/BREITWELSER/COMPLAIN

Bank One Tower
111 Monument Circle, Suite 4600
Indianapolis, Indiana 46204-5146
Facsimile 317-236-8472

Telephone 317-236-8020

Attorneys At Law

Lowe Gray Steele & Darko, LLP

E. Scott Treadway

June 2, 1998

Carol Browner
Administrator
United States Environmental Protection Agency
401 M Street, S.W.
Mail Code 1101
Room No. W1200
Building WSM
Washington, D.C. 20460

David Ulrich
Acting Regional Administrator
United States Environmental Protective Agency
77 West Jackson Boulevard
Chicago, Illinois 60604

John Hamilton
Commissioner
Indiana Department of Environmental Management
100 North Senate Avenue
P.O. Box 6015
Indianapolis, Indiana 46204

Jeffrey Modisett
Office of the Attorney General
Indiana Government Center South
402 West Washington Street, 5th Floor
Indianapolis, Indiana 46204

Lady and Gentlemen:

This letter is to inform you of the intention of Save the Valley, Inc., Thomas Breitweiser and L. Jae Breitweiser to bring an action against the United States Environmental Protection Agency ("EPA"); Carol Browner in her official capacity as Administrator of the EPA ("Browner"); the Indiana Department of Environmental Management ("IDEM"); and John Hamilton in his official capacity as Commissioner of IDEM ("Hamilton"), pursuant to Title 33 U.S.C. § 1365 of the Clean Water Act ("CWA"). As you may be aware, § 1365 authorizes citizen suits:

EXHIBIT

A